Northwest Pipe & Casing Co. ***and*** **International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers, Local Union No. 72, AFL–CIO.** Cases 36–CA–5946 and 36–CA–6103

November 19, 1990

DECISION AND ORDER

BY MEMBERS CRACRAFT, DEVANEY, AND OVIATT

On May 16, 1990, Administrative Law Judge Timothy D. Nelson issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.[2]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Northwest Pipe and Casing Company, Portland, Oregon, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

MEMBER OVIATT, concurring in part.

I agree with my colleagues that the Respondent violated Section 8(a)(5) by withdrawing or modifying its August 12, 1988 bargaining proposal in order to frustrate bargaining. I also concur with the majority in requiring the Respondent to reinstitute its August 12 offer for a reasonable period of time to allow for union acceptance or rejection. Unlike my colleagues, however, I would further specify what constitutes a ''reasonable time'' for union action in this case. To ensure expeditious union action on the Respondent's August 12 proposal, and thus hopefully to bring the bargaining process to closure, I would require the Respondent to reinstate its unlawfully withdrawn contract proposal for a period of 30 consecutive days from the date it is formally tendered to the Union. See generally *Mead Corp.*, 256 NLRB 686, 787 (1981). If the Union notifies the Respondent within this 30-day period that the August 12 offer is accepted, I would require the Respondent to sign a contract containing all the terms of that offer and to give that agreement retroactive effect.

In all other respects, I join the majority.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In his decision, at fn. 15, the judge inadvertently stated that Union President Robert Pearse prepared a memo after the August 25, 1988 telephone call between Pearse and the Respondent's vice president Len Kutch. The memo was actually prepared by Kutch.

[2] Contrary to our concurring colleague, we agree with the judge that, consistent with *Mead Corp.*, 256 NLRB 686 (1981), enfd. 697 F.2d 1013 (11th Cir. 1983), the Respondent must reinstate its August 12, 1988 offer ''for a reasonable time.'' As the judge noted, the Board's requirement in *Mead* that the respondent reinstate its unlawfully withdrawn proposal for a specified number of days was based on the particular facts of that case.

Linda J. Scheldrup, Esq., for the General Counsel.
Lester V. Smith, Esq. (Bullard, Korshoj, Smith & Jernstedt, P.C.), for the Respondent.
Robert N. Plympton, for the Charging Party.

DECISION

STATEMENT OF THE CASE; PRINCIPAL ISSUES; SUMMARY OF FINDINGS

TIMOTHY D. NELSON, Administrative Law Judge. I heard these consolidated 8(a)(5) and (1) cases in trial in Portland, Oregon, on September 6 and 7, 1989. They trace originally from unfair labor practice charges filed on October 14, 1988, in Case 36–CA–5946 by the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers, Local Union No. 72, AFL–CIO (Union) against Northwest Pipe & Casing Co. (Respondent). That charge alleged that Respondent had violated its duty to bargain in good faith in three discrete ways: first, by ''submitting a contract proposal . . . which contains new terms and conditions over which the Employer has never bargained with the Union . . . , i.e. Article 5 Hiring'' [the clause-switching element of the charge]; second, by engaging in ''Direct Dealing with . . . employees over the issue of . . . an 'Open Shop Status''''; and third, by ''trying to force the Union to bargain through the mails.''

On November 30, 1988, after investigating, the Regional Director for Region 19 found merit to the direct-dealing element but dismissed the two other elements. Eight days later the Union appealed the Director's dismissal of the clause-switching element to the Office of Appeals, within the Washington, D.C. Office of the General Counsel.[1] In the meantime, on December 1, an agent of the Regional Director had tendered a settlement agreement to Respondent, calling for notice-posting to cure the alleged direct dealing. Respondent later signed the agreement and returned it to the Regional Director. The Union refused to sign it, and the Regional Director never approved it, presumably because the Union had by then filed its appeal of the dismissal of the clause-switching element of its charge. On March 22, 1989, the Director of the Office of Appeals sustained the Union's appeal and authorized a complaint on the clause-switching element. On June 1, 1989, acting for the General Counsel, the Regional Director issued a complaint incorporating both the direct-dealing and clause-switching elements. On June 12, 1989, the Union filed an additional charge in Case 36–CA–6103, alleging that Respondent was unlawfully refusing to arbitrate certain grievances. On July 14, 1989, finding merit to the most

[1] The Union acquiesced in the Regional Director's dismissal of the ''bargaining through the mails'' count, and Respondent's conduct in that regard is no longer challenged as unlawful.

recent charge, the Regional Director ordered the two cases consolidated and issued an integrated consolidated complaint.

In its most highly controverted counts relating to the alleged clause-switching, the complaint avers that in late August 1988 Respondent substituted an ''open shop clause'' for a ''union shop'' clause in its previously implemented final-offer package proposal to the Union, this after the Union had told Respondent on or about ''August 15'' that the Union ''would vote the contract with all the agreed-upon changes as soon as the Employer provided the Union with a complete contract document incorporating all changes agreed to by the parties.'' The complaint charges that Respondent made this switch in clauses ''in order to avoid reaching and to frustrate agreement with the Union,'' and ''in retaliation for activities protected by the Act.''

In a related 8(a)(1) count the complaint alleges that Respondent's vice president, Len Kutch, ''informed'' employees on September 28, 1988, that ''Respondent was retaliating against employees (by withdrawing the standard union-shop clause from the . . . proposal) because the Union filed unfair labor practice charges against Respondent on behalf of Respondent's employees.'' Apart from those central violations the complaint alleges that Respondent engaged in unlawful ''direct dealing'' on April 20, 1988, and that Respondent has refused ''since May 18, 1989'' to process certain grievances to arbitration.

In other paragraphs the complaint proposes as a matter of law that the parties had ''reached full and complete agreement'' as of August 15, 1988, said ''agreement'' consisting of Respondent's outstanding proposal, as later spelled out in the integrated proposal which Respondent mailed to the Union on September 28, 1988 (but replacing the ''open shop'' clause in that September 28 rendition with the ''standard union shop clause'' that previously had been part of Respondent's implemented final offer package). It alleges as a a matter of fact that the Union ''ratified'' that August 15 ''agreement'' on May 3, 1989, and that, since May 5, 1989, Respondent has unlawfully refused to sign and otherwise ''execute'' a union-prepared version of that ''agreement.''

The complaint seeks a remedial order requiring Respondent to sign a contract document, either in the exact form presented on May 5, 1989, by the Union, or in the form presented by Respondent on September 28, 1988 (but modified in that latter case to replace the open-shop clause with the union-shop clause).

Respondent admits that its operations have sufficient impact on interstate commerce to warrant the Board's assertion of jurisdiction; it admits that it modified its previously implemented final offer in late August 1988 by substituting an open-shop clause for the previous union-shop clause. Respondent denies that its substitution of clauses was intended to frustrate agreement or to retaliate against employees for exercising protected rights. Respondent denies that the Union ever told its agents on or about August 15 that the Union was prepared to submit its previously implemented offer for ''ratification.'' In any case, Respondent insists that it could lawfully engage in such substituting of clauses in all of the historical circumstances. Consistent with this, Respondent vigorously contests the notion that any ''agreement'' existed between the parties as of August 15, 1988. Moreover, Respondent argues that even if it were found to have violated Section 8(a)(5) by a bad-faith switching of proposed contract clauses, the Board cannot appropriately remedy that violation by impressing an unbargained ''agreement'' on the parties. Respondent does not seriously contest the facts offered by the General Counsel to prove other counts in the complaint.[2]

I have studied the record and the parties' posttrial briefs. On that record and and on my assessments of the witnesses as they testified and my judgments of the inherent probabilities, I shall conclude that Respondent violated the Act substantially as alleged in the complaint. For reasons I explain in the remedy section, however, I will not fully adopt the General Counsel's prayer for relief.

FINDINGS OF FACT

I. BACKGROUND

Respondent, an Oregon corporation, manufactures steel pipe at its plant in Portland. The Union has historically represented Respondent's nonsupervisory production and maintenance workers and truckdrivers, a wall-to-wall unit which included from 80 to as many as 130 employees during times that concern us. A 3-year collective-bargaining agreement covering that unit expired in the summer of 1985.

Over the next 3 years the parties met periodically to negotiate a new contract. The Union made it clear from the beginning that no agreement at the bargaining table could be considered binding unless and until a majority of the Union's members were to ratify it. Thus, agreements at the bargaining table on certain language were recorded on the parties' bargaining records as ''TA,'' denoting ''tentative agreement.'' At various intervals along the way Respondent ''implemented'' whatever then constituted its currently-proposed package of terms and conditions; each successive implementation included all terms and subjects on which the parties in the meantime had reached tentative agreement.

Since the summer of 1986, when Respondent first implemented its then-outstanding package of proposals, bargaining has been conducted under the auspices of the Federal Mediation and Conciliation Service (FMCS), most recently through FMCS mediator Paul Stuckenschneider. The Union has been represented throughout all negotiations by Robert Plympton, its business manager, although for a few sessions in February and March 1988, Leonard Beauchamp, a representative from the Union's International staff, stepped in on the Union's behalf and played an active bargaining role. By the beginning of 1988 Respondent had introduced a new team of bargaining spokesmen, consisting of Len P. Kutch, Respondent's vice president of manufacturing, and Bruce T. Bischof, an attorney and labor relations consultant who operates from offices in Sunriver, Oregon, about 150 miles from Portland.

Both parties agree that the bargaining rounds in 1988 yielded the most distinct increase in the number of TA items. And, as detailed below, both parties acknowledge that by the time Respondent made what it then called its ''final'' and ''conclud[ing]'' offer on August 12, 1988, there remained in all of Respondent's package of proposed terms a dispute con-

[2] With respect to the ''direct dealing'' count, Respondent introduced evidence showing that it unilaterally posted the notice prescribed in the settlement proposal. Respondent does not contend that the unapproved settlement should operate as a bar to the current prosecution of the direct-dealing element or any other element; Respondent maintains only that its unilateral posting has adequately cured any direct-dealing violation.

cerning only seven specific items. Before returning to the key events which began with Respondent's submission of its August 12 offer, however, it is necessary to discuss a preliminary skirmish between the parties in April, one which is associated with the first of the violations alleged in the complaint, the direct-dealing count.

II. APRIL 1988: RESPONDENT INTRODUCES MAINTENANCE-OF-MEMBERSHIP CLAUSE

Over the course of the first 2-1/2 years of bargaining for a successor contract, that is, until April 18, 1988,[3] Respondent's proposals had always included the same union-shop language that had been contained in the old contract's article 5, *Hiring*, section.[4] On April 18, however, Respondent presented a new ''last and final offer'' to the Union, this one containing a new clause at article 5 which provided only that ''employees who are current members'' of the Union would be required as a condition of employment to maintain their membership. In a cover letter to Plympton attached to the April 18 offer, Bischof called attention to this change in article 5 to a ''maintenance of membership'' clause,[5] and explained that ''The Company has good reason to believe that less than half of the current bargaining unit are members in good standing of the Union.''[6] In this letter Bischof also alleged that Plympton had stated at a recent bargaining session that the Company's offer (even before the introduction of the maintenance of membership clause) was ''unacceptable,'' and that the Union ''intended to strike.'' Referring to this, Bischof asked Plympton to ''reconsider . . . and instead, take this offer to the entire bargaining unit for their consideration.''[7] Finally, Bischof advised Plympton that, absent the Union's acceptance of the April 18 offer, Respondent would ''implement'' its terms on April 25.

Plympton replied to Bischof with two letters, both dated April 19, both mailed in the same certified envelope. In one letter Plympton complained that the Company's new language in article 5 constituted a ''major change'' in what the parties had tentatively agreed to previously, and demanded an opportunity to bargain over it before any implementation. In the other letter, Plympton denied that the Union intended to strike, and purported to quote himself as having said in the meeting in question, '''that if the company implemented their last offer the membership could vote to take strike action.''' [Emphasis in original text.]

III. THE ''DIRECT DEALINGS''; RESPONDENT'S REVERSION TO A UNION-SHOP PROPOSAL

About this point, according to employee and shop steward Richard (''Jack'') Stephenson, Kutch called employees together in separate group meetings to conduct show-of-hands votes on whether employees preferred the old union-shop clause or the Company's recently proposed clause. In the meeting in the smokehouse attended by Stephenson (and about 20 other employees), everyone affirmed their preference for the union-shop clause. As Stephenson recalled it, Kutch then said, ''well, he'd go along with the majority . . . [and that] he was glad to see . . . what the employees wanted, so he'd go along with it.''[8]

Bischof wrote back to Plympton on April 21 (apparently after Kutch's meetings with employees), stating that ''the Company will withdraw the maintenance of membership language,'' and would ''[i]nstead, . . . reinstate the Union Security Proposals contained in the preceding proposals . . . .'' Bischof added, however, that ''the Company still has good reason to believe that more than half the bargaining unit employees are not union members.'' Plympton replied on April 25 that the Union would ''accept the Company's proposal to reinstate the [traditional] Union Security provisions,'' and, invoking the ''new hire reporting'' language in that provision, Plympton ''request[ed] that this arrangement should be agreed upon as soon as possible.''

On April 25, Respondent implemented the outstanding final offer, as revised to restore the traditional union-shop clause.[9] In a letter of that date to Plympton announcing the implementation, Bischof complained of the Union's ''regressive bargaining'' during prior sesssions on April 13 and 15, and further announced that henceforth, ''the company will consider only communications from [the Union] which are

[3] All dates below are in 1988 unless I specify otherwise.

[4] The ''union shop'' clause in the old contract, adopted in all of Respondent's proposals until April 18, (*) states in pertinent part, ''All employees covered by this Agreement on its effective date, or subsequently hired hereunder, shall . . . after the 31st day following the beginning of their employment, or the effective date of this Agreement, whichever is the later, become and remain members . . . of the Union as a condition of continued employment.'' It also provides that Respondent ''shall terminate'' any noncomplying employee upon the Union's written notice, that Respondent ''shall inform'' employees of these obligations, and that Respondent ''shall report'' new hires to the Union in a manner to be arranged.

(*) See, e.g., Kutch's February 5, 1988 letter to Plympton (G.C. Exh. 3, p. 2) predicting an increase of 50 bargaining unit employees and emphasizing that, ''Based on the union security provision in the contract proposal Kutch was urging Plympton to accept your union will also share in the growth.'' Indeed its ''last and final offer'' presented as recently as April 13 had contained the standard union-shop language.

[5] At times the parties and the witnesses have referred to this proposal, too, as an ''open shop'' clause. But it should be recalled that the language (abortively) advanced at this stage by Respondent is not the same language as the plainly ''open shop'' clause which it subsequently introduced in late August.

[6] Respondent made no attempt in this proceeding to show that this was actually the case, nor that it was ever possessed of grounds for believing it to be true. I note, moreover, that only 5 days earlier, on April 13, Respondent had tendered a contract proposal containing the traditional union-shop language at art. 5. Thus it remains unclear what had happened between April 13 and April 18 to cause Respondent to advance the maintenance-of-membership clause.

[7] Respondent took the opportunity of the alleged strike ''threat'' to write letters, handed individually to ''All Bargaining Unit Employees'' on April 18. The letters, signed by Kutch, ''urg[ed]'' the addressee to ''remain on the job.'' They contained pleas for understanding of Kutch's attempts to ''return [the company] to profitability after its emergence from bankruptcy,'' and implied that bargaining had gone better when the Union's International representative, Beauchamp, had served as the Union's ''Chief Negotiator,'' but had more recently foundered as a result of Plympton's obstinacy or incompetence.

[8] Kutch was not asked to dispute any portion of Stephenson's account, and I therefore rely on Stephenson, who struck me as fully candid, for these findings. Stephenson's account is vague about the date of these events, but the sequence he describes makes it probable, as alleged in the complaint, that Kutch's meeting(s) with employees happened on April 19 or 20, between April 18, when Bischof first presented the ''maintenance of membership'' novelty, and April 21, when, as I describe below, Bischof abandoned it and restored the union-shop clause to the Company's pending offer.

[9] In clarifying colloquy (Tr. 374–375) Bischof agreed that the union-shop clause was part of the package of proposed terms being ''implemented'' on and after April 25. But Bischof states he instructed the company not to ''apply'' the union-shop provision and advised that it was ''nonoperable pending a signed contract.'' The record does not show otherwise; that is, no evidence shows that Respondent's various admitted ''implementations'' of pending offers, including the one made on or about April 25, were followed by any affirmative steps on Respondent's part (or on the Union's part, for that matter) to implement or enforce the union-shop clause.

reduced to writing and transmitted to the Federal mediator, who in turn may determine whether or not the communication is worthy of forwarding to company representatives.''

IV. MAY TO MID-AUGUST: CHARGE-FILING AND DISPOSITION: FURTHER NARROWING OF BARGAINING ISSUES

On May 9, the Union filed a charge in Case 36–CA–5811 alleging that Respondent was bargaining in bad faith by imposing the conditions set forth in Bischof's April 25 letter to Plympton. On May 17, with some indication that Respondent would at least meet at a common location, albeit in separate rooms, to exchange communications with the Union through an FMCS mediator, the Union withdrew that charge.[10] On that same May 17 date, however, the Union filed a charge in Case 36–CA–5820 alleging that Respondent was bargaining in bad faith because it had ''illegally implemented its contract offer April 25, 1988 prior to reaching impasse.'' On June 7 the Union withdrew that charge.

On July 5, the parties ''met'' and exchanged bargaining proposals through mediator Stuckenschneider, but did not otherwise communicate. On July 11, the Union filed charges in Case 36–CA–5864 alleging that Respondent in bad faith had ''made substantial changes in their implemented contract . . . [in that it had] presented . . . proposed modifications . . . and has refused to come to the bargaining table . . . [and] also refused to give the Union . . . dates to resume . . . negotiations.''

Also on July 11, Kutch wrote a letter to employees (one of many mailed by Respondent to explain its position in the ongoing negotiations and associated disputes) in which Kutch promoted Respondent's outstanding implemented proposal as a basis for agreement. He also took this opportunity to attack Plympton as the party to blame for any lack of agreement to date, charging that Plympton had come ''unprepared'' to the most recent bargaining session.[11] He complained further that Plympton was harrassing the Company with charges to the NLRB and other agencies, and suggested that Plympton wished only to impair the Company's and the employees' chances for a successful partnership. Thus, Kutch asserted that ''Plympton has written 17 letters, filed two unfair labor practice claims and complained to OSHA about hazardous equipment[,]'' and closed his letter with an expression of ''Thanks again to those of you who are trying to make it work in spite of those outside the Company that seem to want failure.''[12] On July 19, the Union withdrew the charge in Case 36–CA–5864, Respondent having agreed in the meantime to another FMCS session.

On July 26 the parties again ''met'' under FMCS auspices. There (I rely on Plympton's uncontradicted testimony), the Union first proposed revisions to a drug testing announcement Respondent had posted in the plant much earlier, but had never presented across the bargaining table. Respondent, in turn, somehow signified in reply that its posted announcement was ''withdrawn.'' It is undisputed that the Union then presented Respondent with its own proposal, requesting in effect that Respondent make 11 changes from its outstanding implemented proposal. Respondent agreed to review these and get back to the Union about them.

On August 11, the Union filed charges in Case 36–CA–5893 alleging that Respondent had ''unilaterally changed the wages[,] hours & working conditions in its implemented contract proposal.'' Underlying this charge was a dispute over a single 8-hour overtime claim involving an employee named Knutsen. The Union withdrew those charges on September 26.

V. AUGUST 12; RESPONDENT CONCEDES ON 4 OF 11 OUTSTANDING ISSUES

On August 12, before learning of the Union's most recent charge in Case 36–CA–5893, Bischof wrote to Plympton, complaining first that ''[m]ost of the eleven changes'' presented by the Union on July 26 ''were not minor, but were major obstacles to agreement in past mediation sesssions.'' Bischof continued, however, that,

> Despite the disappointment, we have carefully reviewed your eleven proposed changes. In the spirit of trying to reach a final agreement, the Company is willing to accept and implement the following proposed changes.

Bischof then listed the four union-requested ''changes'' from its proposed package that Respondent was now prepared to accept. (As everyone now agrees, Respondent's concession on these four items left only seven items in disagreement—those seven additional ''changes'' sought by the Union in Respondent's ''implemented'' package.) In concluding paragraphs, Bischof made a ''final appeal'' for the Union to ''take the terms of the implemented contract [sic] plus the above concessions to the employees for their review and approva[l],'' and announced that ''This contract package concludes the Company's bargaining towards a successor agreement.'' Although couching this offer in ''final'' and ''concluding'' terms, Bischof spoke of no deadline for its acceptance, nor did he give any hint that Respondent might later take a more regressive stance.

VI. THE UNION'S CALLS TO KUTCH SEEKING AN INTEGRATED CONTRACT WRITING

Plympton testified, and so did the Union's president and business agent, Robert Pearse, that shortly after the Union received Bischof's August 12 letter, these officers reached the

[10] The Union revived that charge in that portion of the instant charge which complained that Respondent was trying to force the Union to ''bargain through the mails.'' As previously noted, that element of the instant charge was dismissed on the merits and is not before me for consideration. I therefore presume for all purposes that Respondent did not act unlawfully when it imposed the bargaining conditions announced in Bischof's April 25 letter to Plympton.

[11] While the notion that Plympton was playing an obstructionist role as a negotiator is a recurring theme in Respondent's communications with employees, and was echoed in the testimony of Kutch and Bischof, and again Respondent's brief, Respondent does not ultimately defend against this complaint on the grounds that Plympton's behavior as a negotiator somehow excused its complained-of actions. Certainly Respondent has made no record on which it could be found that the Union had engaged in ''regressive bargaining,'' or had negotiated so inflexibly or with such intransigence as to ''preclude the existence of a situation in which [Respondent's own] good faith could be tested.'' Cf. *Times Publishing Co.*, 72 NLRB 676, 683 (1947); *Continental Nut Co.*, 195 NLRB 841, 858 (1972); *Roadhome Construction Corp*., 170 NLRB 668 (1968). Accordingly, I will not address the matter of Plympton's bargaining behavior any further.

[12] As noted, the record shows that the Union had filed two unfair labor practice charges against Respondent by this point, one of which had already been withdrawn. But the record contains no evidence that Plympton or any other agent of the Union had filed any ''OSHA'' or other charges against Respondent, much less how many, or what they may have been about.

judgment that they could recommend Respondent's current package, containing the Company's four most most recent concessions, to the membership. They further agree that within a week of their receipt of that letter Plympton asked Pearse to call Kutch to request a completed, integrated, contract writing from Respondent, one which reflected all of the evolving agreed-on changes since the April 25 implementation,[13] one which would include the Company's outstanding language in the seven areas in which the Union had previously sought changes, one which, moreover, could be copied and given to each member before a ratification vote could be conducted.[14] I credit Plympton's and Pearse's accounts of these ''backstage'' deliberations. As I discuss next, they are harmonious with what Kutch himself recalled, however grudgingly, about a follow-up call he received on August 25 from Pearse in which Plympton eventually became involved.

Pearse testified in summary terms that he made at least one call to Kutch pursuant to Plympton's instructions at least a week before the August 25 call discussed below. Without ever giving a comprehensive account of what he said to Kutch in this preliminary call (or perhaps series of calls; Pearse was not sure), Pearse's testimony clearly suggests that he conveyed the message that the Union wanted a comprehensive contract document to take to the membership, and that Kutch, in response, encouraged Pearse in the belief that the company would indeed provide one.

No one disputes that Pearse called Kutch again on August 25 to press the request, and that Plympton eventually joined this conversation from another telephone extension in the Union's office. Kutch claimed not to be sure whether the August 25 call had been preceded by an earlier call. I credit Pearse that he had made at least one such prior call to Kutch, roughly a week earlier. My judgment is influenced not merely by Pearse's apparent candor, but also by Kutch's own wriggling on this point at trial, and by the words he chose to use in writing a private memorandum of the August 25 call.[15]

Pearse never offered an explicit account of the August 25 conversation, but Plympton and Kutch did, and their versions, stripped of the undue editorializing to which each was prone, resound harmoniously on at least one material point—that the Union (again) effectively communicated to Kutch that it wanted an integrated contract writing to take to the membership. Plympton, in his own most coherent version, is quite explicit; thus,

> We expressed to Mr. Kutch . . . the necessity for the company to give us a comprehensive contract in total, so we could submit it to the members for voting, because there had been so many changes, classifications, et cetera. I explained to him that I might have to explain what one brother would get paid under the contract. . . . so I wanted all that done so everybody knew what classification was going to be there, and all the other changes that they'd agreed to and we'd agreed to . . . in one solid agreement, so I could submit it for ratification.

Kutch, although waffling on some features, is almost as explicit: Thus, describing Pearse's opening remarks in that call, Kutch acknowledged that, ''they were thinking about taking something to the membership . . . that they were confused about what they had, that they didn't know all of the changes that had been made since the [April 25] implementation,'' and thus asked Kutch to bring the Company's current proposal ''up to date'' and to ''give [the Union] an updated copy.''[16]

Acknowledging that he had received this much information, Kutch says he then ''started talking about a ULP charge they had'' when Plympton's voice came on the line to ''explain the ULP.''[17] At one point in his testimony, claiming to have become ''real suspicious because of all the experience we'd had with ULP's and people calling the OSHA and DEO and the EPA and . . . so forth,'' Kutch insisted that he made no direct reply to the Union's request, but instead told the union agents to put any question they might have ''in writing, through Mr. Bischof.'' Elsewhere, however, Kutch inconsistently recalled that he replied instead that he would ''check with Bischof and see if we can do something like that,'' that is, prepare an integrated writing.

Kutch admits that he called Bischof on either August 25 or 26 and reported the substance of his conversation with Pearse and Plympton, but he is vague about precisely what he told Bischof. Bischof acknowledged that Kutch called him on the morning of August 26, but professed to have no clear recollection whether Kutch had reported that the Union was interested in taking Respondent's outstanding proposal to the membership (although, as described below, Bischof admits that Pearse communicated this to him on September 1).

In my judgment the probabilities warrant a finding, which I make, that Kutch reported on the 26th not only (as Bischof admits) that ''Pearse . . . wanted us to prepare an agree-

[13] Many of these post-April 25 changes related to wage rates pertaining to particular classifications, and, as they had agreed, Respondent had applied them to the affected employees.

[14] On the general subject why Plympton chose to direct Pearse to call Kutch, rather than Bischof, for the requested integrated contract writing, Plympton and Pearse plausibly explained that Kutch's staff, using the Company's word processor, had generated most of the working papers to date. Therefore, so they reasoned, it would be easier for Respondent (specifically Kutch) to arrange for the Company's word processing data base to be manipulated to produce an integrated version of its own current proposal than for the Union to attempt a scissors-and-paste job of its own, relying on more fragmentary paper sources.

[15] Pearse prepared a memo after the August 25 call that is plainly a highly edited and frivolous summary of what he elsewhere admitted was a more involved conversation. But, however truncated, Kutch's memo strongly implies that Pearse had called him at least once earlier with a request for a comprehensive contract writing; thus, Kutch wrote: ''Bob Pearse called to discuss the weather, then *asked when he could expect a response to their request for an updated proposal.*'' [Emphasis added.] The most natural reading is that Kutch understood Pearse's August 25 call as a follow-up on an earlier request.

[16] In his least believable performances, Kutch strained to portray the Union's ''request'' in this conversation as ''confused'' or ''nebulous.'' I find that there was nothing confusing about the Union's request and that Kutch himself plainly understood the basic elements of the request, an integrated writing of the Company's current offer that the Union could present to the members so that they could vote on it. Thus, Kutch spontaneously said at one point that the request ''involved updating the—putting together a comprehensive package, explaining everything that was on the table.'' And elsewhere he admitted, although mincingly, that he understood Pearse's message to be that ''there was something in the past that was on the table that he wanted to present to the members.''

[17] Kutch was here referring to the Union's most recent charge in Case 36–CA–5893, the Knutsen overtime dispute, which had been filed before Respondent had submitted the August 12 offer, but which had not yet been brought to Respondent's attention until some days after it had presented that offer.

ment, to put everything up to date,'' but also made clear to Bischof that the Union wanted such a document *so that it could be presented to the employees for a ratification vote.* Given the fact that Respondent had been pleading with the Union for months to take Respondent's evolving proposals (including its August 12 ''conclud[ing]'' proposal) to the membership for a vote, it would have been surprising, indeed, if Kutch had not immediately reported to Bischof this critical element in the Union's calls (and not merely in the August 25 call but, as I have found, Pearse's earlier call(s) to Kutch in which Kutch received the same message). I think that Bischof, like Kutch, tailored his testimony to obscure this point, and to conform to Respondent's declared litigation position—that Respondent was not aware, before it reverted to an open-shop proposal, that the Union was prepared to take its August 12 offer to a membership ratification vote.

While disputes may linger about some details, from the foregoing I have no difficulty finding at least this much: Possibly as early as August 15 (allowing 3 days for the Union to have received Bischof's August 12 offer, to have deliberated and decided to take it to the membership, and for Pearse to have made his first call to Kutch seeking a full, written recapitulation of the offer),[18] and certainly by no later than August 25, Respondent was on notice that the Union was prepared to submit Respondent's then-current package of bargaining proposals to the membership for approval, and wished only to have a writing of that package in comprehensive contract format before it was presented for a vote.

VII. AUGUST 26 AND THEREAFTER; RESPONDENT REINTRODUCES OPEN-SHOP PROPOSAL

Bischof wrote a two-page letter to Plympton under date of August 26, which was still in the mails at least 2 days later. Bischof referred at the outset to the Union's August 25 call to Kutch, referred also to the Union's charge in Case 36–CA–5893 (Knutsen overtime claim), and reported that he had ''advised'' Kutch to ''direct all inquiries regarding this [sic] matter through my office.'' In what I now judge was a study in evasion, given my finding that Bischof then knew through Kutch what the Union was asking for, and why, Bischof pretended to the understanding that ''this [August 25] call was for the purpose of clarifying working conditions which had been implemented by the Company subsequent to the unilateral implementation on April 25.''[19] Responding over the course of the next four paragraphs, Bischof summarized the recent bargaining history and the various bargaining documents from which the Union might be able to reconstruct not merely the terms in Respondent's offer when implemented on April 25, but also the terms as they had been modified (through tentative agreement) since that date. He concluded that summary by announcing,

> In view of the above written correspondence, your Union is fully aware with respect to the exact changes (concessions) the Company has further agreed to and has incorporated into the April 25 implemented agreement [sic].

Having thus implicitly refused to prepare a new integrated writing, and having implicitly told the Union to generate its own recapitulation of the Company's offer, Bischof then introduced the suggestion that, in any case, Respondent might no longer be willing to adhere to what it referred to as the ''implemented agreement.'' Thus, Bischof wrote: ''The Company is still interested in achieving *several* of the proposals contained in the July 5 memorandum to the mediator. *In addition*, the Company is also *contemplating a proposed change to Article V, Hiring*, based on certain events following the unilateral implementation.[20] Accordingly, the Company *may be contacting you within the next 10 days with possible proposed adjustments* to the implemented agreement.'' [Emphasis added.]

Bischof then professed to deplore that the Union had not yet presented its outstanding proposals to the membership, saying

> The Company was hopeful that the Union would have taken the implemented agreement plus the changes set forth in the August 12 letter to the employees for their consideration.

I find this curious, at the least, and I shall conclude ultimately that this was an expression of crocodile tears, a transparent attempt to shift blame to the Union for not having concluded a contract based on the August 12 offer when, in reality, Respondent's agents then knew, indeed had known for at least a week, that the Union was anxious to prepare for a ratification vote on that offer, and was waiting only for a comprehensive recapitulation of that offer before submitting it for ratification.[21]

[18] The complaint alleges that it was on August 15 that Pearse first signaled to Kutch that the Union was prepared to present Respondent's August 12 proposal for a ratification vote. Pearse's and Kutch's vagueness make it impossible to be certain when this happened. I have found above that the scenario envisioned in the complaint is a ''possible'' one. But because I have found that one of Pearse's calls to Kutch occurred roughly a week before August 25, I also find it not merely possible, but probable, that this happened by no later than August 19. I also find it probable, for reasons discussed above, that Kutch would have reported this first contact promptly to Bischof; and I thus deem it reasonable to infer that Kutch's call to Bischof on August 26 did not represent the first time that Kutch had notified Bischof that the Union was interested in arranging a ratification vote on the August 12 offer.

[19] I do not doubt that what Bischof here described was part of what the Union was asking for; I only regard it as revealingly obtuse on Bischof's part that he would depict as ''the purpose'' for the August 25 call a mere desire on the Union's part for ''clarif[ication]'' of current ''working conditions.''

[20] Bischof never specifically explained from the witness stand exactly what ''certain events'' since the April 25 implementation he was referring to in this August 26 letter. In a more generalized explanation of why Respondent thereafter chose to withdraw the union-shop clause from its offer, however, Bischof spoke vaguely and unpersuasively at one point of the Company's doubt about the Union's standing with employees (''They felt there were a number of employees who were very disenchanted with the union.'') But a more recurring explanatory theme in Bischof's testimony (echoed in Kutch's letters to employees, discussed above and below) is that Respondent saw the union-shop clause as simply a means of ''funding'' an alleged campaign of ''harassment'' by the Union as reflected in the ''NLRB'' and ''OSHA'' charges it had filed. And Bischof admitted eventually that this latter consideration ''. . . was a factor, clearly.'' I will return to these explanations in my concluding analyses. I note here only that the record is entirely devoid of the kinds of details necessary to find that the Union had been involved in any bad-faith ''campaign of harassment'' against Respondent by filing its charges before this Board or by the filing of whatever ''OSHA'' or other charges Bischof and Kutch may have had in mind.

[21] In short, I observe that Bischof was here pretending to express disappointment over the Union's failure to do something which Bischof by then knew the Union had been trying to prepare to do. I observe further that in the balance of the letter Bischof was taking positions which foreseeably would prevent the Union from conducting a ratification vote on the August 12

Continued

Bischof's August 26 letter concluded with an additional reference to the Union's recent charge (''Needless to say, the Company continues to be exposed to further litigation and charges filed with the National Labor Relations Board''), and an admonition that ''It is absolutely imperative that all communications regarding the positions of the respective parties be reduced to writing to avoid any misunderstandings.''

On August 31 (possibly before the Union received Bischof's letter dated August 26), Respondent dispatched a taxi to deliver another letter from Bischof to Plympton. There Bischof wrote, ''This will advise you that effective immediately, the employer hereby withdraws the first paragraph of Section 5 of the proposal which was reinstated on April 21, as a part of the employer's proposal.'' (Bischof was clearly referring here to the union-shop clause the Company had ''reinstated'' in late April, replacing the ''maintenance of membership'' clause the company had abortively introduced on April 18. But Bischof confused the point when, in later spelling out the ''Proposal Which is Withdrawn,'' he repeated the text not of the union-shop clause, but rather the text of the ''maintenance of membership'' language he had abortively introduced on April 18.) In any case, Bischof's ''New Employer Proposal'' was unquestionably for an ''open shop''; thus, the new proposal stated: ''Whether or not to belong to the Union shall be the individual choice and prerogative [sic] of each employee.''

Confused in part by Bischof's plainly erroneous characterization of the ''Proposal Which is Withdrawn,'' and surprised by Respondent's introduction of an open-shop proposal, Plympton directed Pearse to make contact with Bischof. Pearse placed several calls to Bischof's office. They finally made contact on September 1. Although they dispute details, they agree that Pearse expressed the belief that the Company's withdrawal of the union-shop clause must have involved some kind of mistake. They agree, moreover, that Pearse again demanded an integrated version of the August 12 offer to take to the membership.

Three weeks later, on September 20, Bischof confirmed by telegram that ''the Company is currently in the process of preparing a final contract document which will be provided to you no later than Thursday September 29.'' And, indeed, on September 28 the Union received hand-delivery of what Bischof described in a cover letter as ''a revised collective bargaining agreement, which incorporates all modifications which have been implemented subsequent to the Company's original implemented offer of April 25.'' This document included open-shop language at section 5. As everyone now agrees, setting aside the open shop language, the September 28 document reflects an accurate and complete recapitulation of what Respondent had offered as of August 12. As such it reflected (again setting aside the open-shop clause) what the Union had earlier been prepared to submit for membership ratification. And, indeed, on September 30, the Union wrote to Respondent stating that ''the Union is willing to submit the complete [September 28] proposal for ratification vote if the company agrees that Article 5, 'Hiring' in the 'proposed total collective bargaining agreement' . . . is incorrect in that it should reflect what both parties agreed to at the bargaining table [i.e., the traditional union-shop clause].'' Getting no reply, the Union recapitulated the same message in a letter to Bischof dated October 6. Bischof then replied in a letter dated October 10 that Respondent's inclusion of open-shop language in the September 28 document was no mere ''mistake,'' but, rather, that ''the Hiring language . . . is exactly what the Company intended.''

VIII. KUTCH'S LATE SEPTEMBER LETTERS TO EMPLOYEES

On September 20, the same day Bischof had promised the Union by telegram that the Company would prepare an integrated contract proposal by the 29th, Kutch wrote and distributed a two-page letter to employees. Referring to a ''series of meetings'' he had held with employees on August 31, he stated that he ''felt that a lot of you still did not understand my philosophy. I have decided to put it in writing.'' There followed many paragraphs of Kutch's version of the negotiating background; then, a recapitulation of what Kutch described as the ''current situation.'' In succeeding lines Kutch acknowledged that he had received Pearse's request for an up-to-date contract ''so he could take it to a vote and possibly have an agreement,'' but complained that ''at about the same time, he files an unfair labor practice claim with the federal mediator [sic].'' Later, warming to the subject of the Company's planned switch to an open-shop clause in section 5, Kutch declared, '' I simply will not fire someone just because they won't send money to Plympton as a condition of employment.'' And, addressing the ''concern'' expressed by some employees that they would ''lose . . . bargaining power'' in an open-shop setting, Kutch said ''that is not true. I am strongly influenced by what the majority thinks and it doesn't matter if you send hard-earned money to Plympton or not.''

On September 22, apparently believing that Kutch might be swayed by new evidence of ''majority'' sentiment on the matter of the union-shop clause, Shop Steward Stephenson circulated a petition among employees, signed by 77 of the roughly 85 unit employees then working, indicating the signers' preference for a union-shop arrangement. Stephenson presented the petition to Kutch within a day or two.

And on September 28, the same day Bischof delivered the Company's integrated version of its ''modified'' (open shop) final proposal to the Union, Kutch again wrote to employees to announce that ''[T]he final hour of reckoning has arrived. After several years of futile negotiations, numerous unfair labor practice claims, many thousands of dollars in legal fees and continuing strike threats, the time has come to make a final decision.'' Kutch then referred to the contract being sent to the Union the same day, and acknowledged that, ''apparently the only remaining issue preventing ratification is the open shop contained in Article 5.'' Acknowledging further ''that many of you signed a petition stating you want to keep the union security clause . . .,'' Kutch eventually explained that he had,

offer—not merely by implicitly refusing to prepare a comprehensive integrated writing which would accelerate and aid the ratification process, but, more fundamentally, by announcing simultaneously that the Company might soon introduce wholly new terms, including in the highly sensitive union- security area. Clearly, the Union's underlying wish to take the Company's outstanding package to a membership vote (the same as the wish trumpeted regularly by Respondent, including in this very letter) would be frustrated if the Union could no longer present the current ''implemented agreement'' to the members as Respondent's current bargaining offer. And, as I relate below, Bischof soon made it even more futile for the Union to try to schedule a ratification vote on the August 12 offer, by hastily delivering a radically new formal company proposal withdrawing union-shop and proposing instead an open-shop arrangement.

> [c]oncluded that union security is not in anyone's best interest. Simply speaking, the union has filed law suit after law suit trying to bring our struggling company to its knees. I am now convinced that Plympton is intent upon destroying our Company. By agreeing to a union security provision, your compulsory dues continue to finance Plympton's law suits against the Company. This only serves to take money away from our potential bonus.

And, after claiming that the Company had spent close to ''one third of a million dollars in legal fees and lost management time defending these frivolous lawsuits,'' Kutch urged employees ''not to let the union destroy our progress by calling you out on strike,'' and implored, ''Please do not put the Company in the position of having to replace you in the event of a strike.'' He also advised his readers, ''It is important that you not be misled by Plympton's claims that the Company has committed unfair labor practices, thereby entitling you to return to your job with back pay, if you strike. This simply is not true.'' And in his final paragraphs, Kutch said,

> If Plympton feels that he has a case for an unfair labor practice claim, then he should file it with the NLRB . . . . Have Plympton file his unfair labor practice and the Company will abide by the final result. Again, I appeal to you to trust me in this. I have your interests at heart and won't steer you wrong.

IX. AFTERMATH; SUBSEQUENT CHARGES; THE 1989 REFUSAL TO ARBITRATE

Many of the ensuing events have already been summarized in the Statement of the Case. The Union did, indeed, challenge Respondent's right to engage in the clause-switching by filing the original charge on September 28, and that element of the charge was first dismissed, then reinstated in 1989 by action in the Office of Appeals. In the meantime, the Union also filed additional charges against Respondent (as many as 17 separately docketed charges, some of them recapitulating elements of earlier charges), all but one of which were either withdrawn subsequently, or dismissed as nonmeritorious. In the exceptional case, involving a charge filed September 27, 1988, in Case 36–CA–5929 alleging that employee Richard Keith had been discriminatorily laid off, the Regional Office deferred processing that charge after Respondent offered on October 24 to allow a parallel grievance to be submitted to arbitration ''pursuant to Article 11 of the grievance procedure.'' Thus, apparently, in October 1988, Respondent treated the arbitration clause in its implemented package as having ongoing vitality.

After learning that the Office of Appeals had authorized a complaint over Respondent's late August 1988 clause switching, the Union conducted a ''ratification'' vote on May 3, 1989, presenting to its members the contract package set forth in Bischof's recapitulating document of September 28, 1988, but substituting the traditional union-shop clause for the open-shop clause contained in that document. The vote was for ''ratification.''[22] And, on May 5, the Union so advised Respondent, enclosing a signed writing of that ''ratified'' version, and inviting Respondent's signature on it. This was an invitation which Respondent predictably declined, given its position that its current offer did not match with the union-shop language contained in the ''ratified'' version.

There is no dispute that the Union thereafter filed grievances on behalf of five employees, which Respondent has refused to allow to proceed to arbitration. Notwithstanding its October 1988 willingness to acknowledge some vitality to the arbitration scheme, at least for purposes of invoking the Board's deferral policies, Respondent's current position is that it has no duty to arbitrate grievances in the absence of a mutally binding agreement providing for arbitration.[23]

X. ANALYSIS AND CONCLUSIONS OF LAW

A. *The Direct Dealing Count*

When, on or about April 19 or 20, 1988, Kutch conducted a show-of-hands poll to determine the degree of employee support for a union-shop clause, Respondent engaged in a classic ''bypassing'' violation. Respondent's duties under Sections 9(a) and 8(a)(5) of the Act included the duty to treat the Union as the authentic voice of the employees on bargainable matter. Thus, the Board has held that an employer may not ''determine for himself the degree of support, or lack thereof, which exists for the stated position of the employees' bargaining agent.'' *Obie Pacific*, 196 NLRB 458, 459 (1972); see also, *M & C Vending Co.*, 278 NLRB 320, 325 (1986). The Union's position on the issue of union shop versus open shop was unmistakable. Kutch's poll was grossly inconsistent with Respondent's obligations under Section 8(a)(5), and, derivatively, the poll violated Section 8(a)(1).[24]

The General Counsel contends further that Kutch's poll constituted an independently unlawful ''interrogation'' on a subject, union shop, that ''goes to the heart of employees' support for the Union.'' I agree; Kutch's poll is easily seen, in context, as an attempt to determine the degree of unit employee support for the Union as an institution during a critical bargaining phase, and not merely as an effort (itself unlawful, supra) to inform itself by direct dealings with employees how certain of its bargaining proposals sit with the employees, as opposed to their agents at the bargaining table. And by asking employees to manifest their sentiments by a show of hands, the poll was nearly as direct an ''interrogation'' of employees regarding their union sympathies as if Kutch had approached them one-by-one with the same question. Seen in that light, the poll independently violated Section 8(a)(1). *Greenleaf Motor Express*, 285 NLRB 844 fn. 3 (1987).

B. *The Clause-Switching and Related 8(a)(1) Counts*

The complaint alleges as fact that Respondent's belated withdrawal of the union-shop clause and substitution of an open-shop clause was done to avoid reaching agreement and in retaliation for the employees' protected activities (most specifically, the Union's filing of unfair labor practice

[22] Of course, by then, Respondent's outstanding offer was at variance with the supposed ''agreement'' being ''ratified,'' precisely on the art. 5 language. But, apparently, the Union found it tactically useful at that point to be formally on record as having taken all steps necessary to perfect that (hypothetical) ''agreement.''

[23] See colloquy on the point at Tr. 156, 158.

[24] The complaint seeks only a finding that Kutch's poll violated Sec. 8(a)(1); since the matter was fully litigated, I would find, as well, that the poll amounted to an independent violation of Sec. 8(a)(5).

charges against Respondent on behalf of the employees). I think it is plain from my findings above that both of these factual claims are well supported, but I shall briefly recapitulate the main points, and, in the process, I shall discuss how Respondent has chosen to deal with them.

Addressing the allegation that Respondent's specific motive in withdrawing union shop was to frustrate agreement, Respondent seems to have chosen to construct its major defense on the factual claim that it did not know that the Union was prepared to seek ratification of its August 12 offer when, on August 31, it substituted an open-shop proposal. I have rejected that contention as a factual matter, finding instead that Respondent did have such prior knowledge, indeed that Bischof had then known for at least 5 days (and probably for longer) that the Union was pressing its demand for a contract writing to facilitate a ratification vote on Respondent's earlier offer. Clearly, therefore, Respondent's August 31 proposal to substitute open shop for union shop was made with such knowledge.

Moreover, I have no difficulty concluding that Respondent withdrew the union-shop clause ''at a time when acceptance by the Union appeared imminent.''[25] Thus I have found that Respondent was on notice no later than August 25 that the Union intended to submit Respondent's August 12 package for a membership vote, and I here observe, as well, that Respondent then had no reason to doubt that the vote, if conducted, would be in favor of ratification.[26]

Although Respondent has not explicitly advanced this point, an undercurrent in its defense, as variously espoused, is that Respondent had become tired of waiting for the Union's reply to its August 12 offer (and, implicitly, that this impatience on Respondent's part might justify a change in Respondent's outstanding offer). While I concede that an offer may be deemed to have expired if not accepted within a reasonable time, I have no basis for concluding that the Union had delayed unreasonably in acting on Respondent's August 12 offer. By my earlier reckonings, Pearse made his first call to Kutch indicating the Union's wish to conduct a ratification vote no later than August 19. This hardly represents an unreasonable ''delay,'' and it is at least arguable that any ''delay'' thereafter in proceeding to a ratification vote was more properly traceable to Respondent's own delays in replying to Pearse's original request for an integrated writing of that offer.

In any case, Respondent's August 12 offer had never been identified as a time-limited one in the first place; the only stipulation made by Bischof in transmitting it was that it was Respondent's ''final'' and ''conclud[ing]'' offer. But such statements, taken at face value, amount only to firm declarations that Respondent was not prepared to vary further from the offer, and, seen this way, they carry no implication of a deadline for acceptance; if anything they convey an opposite message—that there was no particular urgency in the Union's acting on the offer, since it was not likely to be withdrawn or modified in the foreseeable future anyway. I thus find it impossible to infer that Respondent's August 12 offer had ''lapsed'' at any time before Respondent formally modified it by proposing open shop on August 31. Rather, I think it more reasonable in the circumstances to judge that, at least until August 31 (when Bischof's open-shop substitution was delivered by taxi to the Union), Respondent's August 12 offer was in all senses an ''outstanding'' one, one legally capable of acceptance by the Union, and one which Respondent had every reason to believe was likely to be accepted if only a ratification vote could be held. I must conclude also that this is how Respondent itself appreciated the situation as it then stood; at least this is the only way I can understand why Respondent would go the extraordinary measure of delivering Bischof's substitute proposal *by taxi* on August 31, apparently out of concern that the Union might accept the August 12 offer unless it were promptly modified.

I must infer from all this that Respondent's withdrawal of the union-shop clause was done not only at a time when ''acceptance appeared imminent,'' but precisely because Respondent was aware of that fact, and therefore, quite literally, was done to ''frustrate agreement'' or to prevent the formation of a binding agreement. So understood, Respondent's withdrawal of the union-shop clause manifested bad faith and violated Section 8(a)(5). *Mead Corp.*, 256 NLRB 686, 696, and cases cited (1981), enfd. 697 F.2d 1013 (11th Cir. 1983). See also, e.g., *Romo Paper Products Corp.*, 220 NLRB 519 (1975); *Glomac Plastics*, 234 NLRB 1309, 1318 (1978); *Luther Manor Nursing Home*, 270 NLRB 949 (1984).

I am mindful that it is not, per se, a violation of Section 8(a)(5) for an employer to withdraw an offer that it had previously advanced, or even one on which tentative agreement had been reached. Thus, without disturbing the holdings of the cases just cited, the Board has also made clear that ''the withdrawal of tentative agreements reached prior to the formation of a legally enforceable contract represents only one factor to be considered in determining good- or bad-faith bargaining''; and the Board has declined to find a violation where the ''employer's explanation for its retraction did not indicate a lack of good faith.'' *Merrell M. Williams*, 279 NLRB 82, 83, and cases cited (1986). But as I have discussed previously, Respondent's main defense was linked to its claimed lack of knowledge that the Union's acceptance of its offer appeared imminent at the time it withdrew a key clause from that offer. I have discredited this defense, and I deem it probable that, in advancing it, Respondent was seeking to conceal that it acted, in fact, from improper motives. In any case, I do not detect in Respondent's brief—much less in the testimony of its witnesses—any coherent attempt independently to ''explain'' its actions in terms analagous to those the Board found exculpatory in *Williams*, supra.

It is true that Respondent did not merely rest on the claim that its withdrawal of union shop was uninformed by knowledge that acceptance of its outstanding offer was imminent; rather, even while maintaining this claim, Respondent also invited Bischof to explain affirmatively why Respondent

[25] *Ramona's Mexican Food Products*, 203 NLRB 663, 684 (1973), enfd. 531 F.2d 390 (9th Cir. 1975).

[26] Respondent has not argued that it had grounds for believing that the Union was insincere about wishing to present the August 12 package for a vote, or that the Union might otherwise try to prevent a majority vote in favor of ratification, or that the members might spontaneously refuse to vote for ratification. (Cf. *Pennex Aluminum Corp.*, 271 NLRB 1205, 1206 (1984).) Rather, Respondent has simply chosen to deny any awareness whatsoever that the Union even planned to submit that package for a ratification vote. In any case, Kutch's September 28 letter (''apparently the only remaining issue preventing ratification is the open shop contained in Article 5'') shows that Respondent assumed that there would have been ratification by the employees of the August 12 offer had it not been for Respondent's intervening withdrawal of the union-shop clause.

eventually withdrew union shop and proposed open shop instead. In reply, Bischof began by making a vague claim—never substantiated—that ''They [unnamed company officials] felt there were a number of employees who were very disenchanted with the union.'' This was not enough to persuade me that Respondent had a genuine doubt in good faith about majority sentiments regarding union shop, much less that any such doubts genuinely influenced Respondent's decision to withdraw union shop. Moreover, this protestation, vague as it was, is undermined further by much evidence that Respondent was unmoved by various demonstrations indicating that a majority of employees *favored* a union-shop arrangement. I therefore do not decide whether this reason, if genuinely entertained by an employer, might pass muster under the analysis employed in *Williams*. In any case, Bischof did not dwell long on this claim, but focused rather on what he sought to characterize as the Union's ''harassment'' of the company with ''NLRB'' and ''OSHA'' charges. (''This,'' said Bischof, ''was a factor, clearly.'') As I discuss next, such reasons as these do not vindicate Respondent, yet they are plainly all that Respondent's counsel would rely on as a fall-back defense, were I to find, as I have, that Respondent switched clauses at a time when it knew or believed that acceptance of its August 12 offer by the Union was ''imminent.''[27]

One problem with these latter claims is that there is no evidence that the Union did, in fact, file ''OSHA'' charges, much less frivolously so, or as part of a bad-faith campaign of ''harassment.'' Another problem is that, although it was demonstrated that the Union had recently filed three different unfair labor practice charges with the Board against Respondent (however, only one—the Knutsen overtime dispute—was outstanding when Respondent withdrew union shop), Respondent again failed to demonstrate that the Union filed these charges frivolously, much less as part of a bad-faith campaign of ''harassment.''

The third, and most fundamental, defect in this essentially unsupported line of defense is that it proves too much, amounting practically to an admission that Respondent switched clauses belatedly simply out of resentment over the Union's recent charge concerning the Knutsen overtime matter (the only charge Respondent had not known about before it had made its August 12 offer). And this admission, in turn, tends to support—not to negate—the alternative claim in the complaint, that Respondent withdrew union shop in ''retaliation'' for the Union's filing of unfair labor practice charges with the Board.

Nothing in *Williams* suggests that an employer may condition its adherence to a proposal on the union's forswearing of its right of access to the Board's processes, much less that an employer may renege on an outstanding offer at a time when acceptance is imminent simply because the union has filed a charge with the Board in the meantime. To the contrary, the Board held in *Markle Mfg. Co.*, 239 NLRB 1353 (1979) that ''it is properly within the Board's remedial power to require a respondent to cease and desist from resting its refusal to agree to a . . . clause on reasons which are illegal,'' and that the employer-respondent in that case had bargained in bad faith by ''withdraw[ing] an existing term and condition of employment dues-checkoff in that case because employees had filed charges and otherwise invoked Section 7 rights by pursuing remedies under the . . . contractual grievance procedure.'' Id. at 1355. And the *Markle* Board (ibid.) further found that

> By thus predicating its withdrawal of an existing condition of employment on lack of participation in protected activity and by implicitly conditioning agreement to a continuation of a checkoff clause [on] the waiver of its employees' right to invoke Board processes as well as other Section 7 privileges, Respondent was clearly impeding and frustrating bargaining for no legitimate purpose.

While a differently-constituted Board later took issue with the factual findings in *Markle*,[28] I am aware of no authority which challenges the legal proposition there advanced. Accordingly, to the extent Respondent withdrew union shop out of pique over the Union's charge in the Knutsen overtime matter, this simply exacerbates the violation, rather than constituting a defense.

C. *Did the Parties Ever Conclude an Agreement?*

As set forth earlier, the compaint proposes as a matter of law that the parties had ''reached full and complete agreement'' as of August 15, 1988, said ''agreement'' consisting of the terms spelled out in the integrated proposal which Respondent later prepared and mailed to the Union on September 28, 1988 (but replacing the ''open shop'' clause in that September 28 rendition with the ''standard union shop clause'' that previously had been part of Respondent's implemented final offer package). It further alleges (somewhat inconsistently) that the Union ''ratified'' that August 15 agreement on May 3, 1989, and that, since May 5, 1989, Respondent has unlawfully refused to sign and otherwise ''execute'' a union-prepared version of that ''agreement.'' The General Counsel has argued in favor of these propositions in her brief, but I remain unpersuaded, and I see in her incon-

[27] In its brief (pp. 30-31) Respondent's counsel gives these points only the most superficial treatment; thus, after noting that ''the withdrawal of such a union security proposal is not in and of itself a per se violation of the Act,'' counsel simply asserts, without further elaboration, that ''In the circumstances of this case the Company's action in removing the clause *made sense for a lot of reasons, including those set forth by Bruce Bischof.*'' [Emphasis added.]

[28] In *American Thread Co.*, 274 NLRB 1112 (1985), the Board (Chairman Dotson; Members Hunter and Dennis) concluded ''that the Board's decision in *Markle* was wrongly decided *on the facts presented there.*'' (Id. at 1355.) [Emphasis added.] Elaborating, the *American Thread* Board found that neither the facts in *Markle* nor in the case before it genuinely showed that the employers had actually imposed any unlawful ''condition'' on the filing of Board charges or contract grievances; rather, the Board found that the employer had merely taken the ''eminently reasonable'' position in proposing elimination of the dues-checkoff clause that this would insulate it from any charge of discrimination against union members by removing a procedure (checkoff) by which it could otherwise determine which grievants or charge-filers were or were not union members. (Ibid.) The *American Thread* Board never suggested, however, that an employer may lawfully withdraw a longstanding union-shop offer simply because, as Respondent contends here, it resents being subjected to unfair labor practice charges and does not wish to ''fund'' such activities through the device of a union-shop arrangement. In any case the Board took pains in *American Thread* to note that the evidence failed otherwise to demonstrate that the employer had ''made its proposal for ulterior motives, i.e., to frustrate negotiations.'' Here, for reasons thoroughly discussed above, the evidence strongly indicates that Respondent's ''real'' reason for withdrawing union shop was precisely to frustrate agreement, and that the Union's filing of the recent charge merely provided a convenient pretext for backing away from its outstanding offer, once it had determined that the Union's acceptance of it was imminent.

clusive arguments a needless confusion of substantive and remedial questions.

Thus, while it may be true, as the General Counsel points out, that the ''common law principles of contract law are not always applied in collective bargaining situations,'' this does not imply that the Board may simply ignore the basic rule that ''offer and acceptance'' are needed to form a legally binding ''agreement.'' And the General Counsel has not acquainted me with any authority for the proposition that an ''agreement'' may be found where, as here, the union never purported to ''accept'' the employer's offer until that offer had already been withdrawn. Neither is it certain on this record that the employees, in August 1988, would have ratified the August 12 offer, or that the Union would then have ''accepted'' it, but for Respondent's unlawful switching of clauses. The most that can be said, given my interpretation of the facts, is that Respondent's unlawful actions were predicated on the *assumption* that ''acceptance'' would soon follow unless it were to withdraw a key part of its proposal, and, as well, that by retrenching on a key portion of its offer, Respondent has made it impossible to know with certainty what would have happened but for its unlawful actions. Certainly, Respondent should not be allowed to profit from its wrongdoing, or or from the doubts which its wrongdoing necessarily created. But, as I discuss below, it is not necessary to pretend that the parties have already reached a mutually binding ''agreement'' in order to avoid such a result.

In short, I judge it a fiction to contend, as the General Counsel does, that the parties had reached an actual ''agreement'' on any of various proposed dates in 1988 or 1989; it is, moreover a useless fiction, given the availability of alternative and adequate relief, as I soon discuss in my recommended remedy.

D. *Respondent's 1989 Refusal to Arbitrate Certain Grievances*

There is no doubt that in October 1988, Respondent invoked the availability of arbitration as grounds for the Board's deferral of any decision on the merits of the Union's charge that Respondent had unlawfully discriminated against employee Keith by laying him off. There is equally no doubt that Respondent later seemed to shift ground when it refused to go along with the Union's 1989 request to take certain pending grievances to arbitration, this time taking the position that, absent a binding agreement, it had no obligation to submit grievances for resolution by an arbitrator.

As I understand the General Counsel's position, she would not argue that Respondent is estopped by its October offer to arbitrate a specific grievance from now denying that it operated under a general duty to arbitrate grievances. And even if that were her contention, it would raise nice questions which I will not find it necessary to decide, in the light of my proposed remedial approach. Rather, as I understand it, the General Counsel, too, presumes that the existence of a binding agreement to arbitrate is a prerequisite to a finding that an employer owes a statutory duty to arbitrate. Thus, the General Counsel argues alternatively that Respondent either was bound, as a matter of law, to an agreement providing for grievance arbitration at the time Respondent refused to arbitrate the grievances in question, or that, as a remedial matter, Respondent must in any case be required to sign and ''execute'' an agreement based on Respondent's August 12 offer. The former theory is not supportable, for reasons discussed in the immediately preceding section; the latter theory is closer to the one I adopt in my discussion of remedies below. At this point I simply judge that it is unnecessary to treat Respondent's refusal to arbitrate as a distinct violation, although such a violation may well be found if, as provided in my recommended remedy, the Union accepts Respondent's August 12 offer upon its resubmission, and if Respondent thereafter refuses to implement the agreement thus perfected by refusing to arbitrate the grievances in question.

THE REMEDY

The complaint prays for a remedy which would include an order requiring Respondent to sign a contract document, either in the exact form presented in May 1989 by the Union, or in the form presented by Respondent in late September 1988 (but modified in that latter case to replace the open-shop clause with the union-shop clause). In effect, the General Counsel would effectively impose on the parties the ''agreement'' (containing the ''union shop'' clause, not the ''open shop'' clause) which the Union could have accepted if Respondent had not unlawfully switched clauses in its August 31 proposal. As I see it, the vice in the General Counsel's position is that it would have the Board treat the parties as if they had actually concluded an agreement where the facts show only that they might well have reached such an agreement absent Respondent's unlawful clause switching. And, to this extent, the General Counsel's remedial position invites a needless conflict with the Supreme Court's teachings in *H. K. Porter Co. v. NLRB*, 397 U.S. 99 (1970), holding generally that it is not within the Board's remedial kit of tools to require parties to agree to any particular bargainable item to which they have not already assented.

We must recall that the real injury to statutory rights here lay not in Respondent's refusal to execute an ''agreement'' which had already been formed by the voluntary action of the parties, but rather it lay in Respondent's bad-faith refusal to adhere to an outstanding offer, in order to prevent the formation of an agreement based on that offer. So understood, the violation may be cured without the Board's pretending that an ''agreement'' has already been formed by the parties, or speculating as to what might have happened if Respondent had not unlawfully switched clauses. Rather, all that is necessary to cure Respondent's violation in this respect is to restore the status quo ante its unlawful refusal; in short to require Respondent to give the Union another chance to accept the offer Respondent held out until, in bad faith, it changed that offer. This is how the Board dealt with an essentially comparable violation in *Mead Corp.*, supra, 256 NLRB at 687, and, in recommending the same approach here, this will leave the Union in the position of being able, if it wishes, to accept that offer, and thus form a binding contract.

More specifically, I note that Respondent's August 12 offer (indeed even its later ''modified'' (open-shop) offer) contemplated that, if accepted, the agreement would be effective retroactive to April 25, 1988. Accordingly, my recommended remedy provides, consistent with *Mead Corp.*, that Respondent shall reinstate the its August 12 proposal for a reasonable time (which, because this situation differs factually from the cited case, I do not here essay to define in advance) and, if the Union chooses within said reasonable time to accept it, that Respondent shall thereafter embody the

agreement thus perfected in written form, sign it, and otherwise execute it, including by giving it retroactive and prospective effect, consistent with its own terms, including by submitting to arbitration the grievances in question herein, should they remain unresolved.

My recommended Order otherwise provides that Respondent shall cease and desist from engaging in the violations I have found it committed herein, and that it shall post an appropriate notice to employees embodying the commitments required by the Order.[29]

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[30]

ORDER

The Respondent, Northwest Pipe and Casing Company, Portland, Oregon, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Bypassing the Union by conducting polls of bargaining unit employees to determine whether or not they agree with positions taken by the Union at the bargaining table.

(b) Interrogating employees concerning their support for the Union, including polling them regarding their support or lack thereof for a union-shop arrangement.

(c) Withdrawing or modifying outstanding bargaining proposals in order to frustrate bargaining or to prevent the reaching of an agreement, or in order to retaliate against the Union or the employees it represents because the Union or the employees file charges with the National Labor Relations Board.

(d) Telling employees that it has modified or withdrawn certain outstanding bargaining proposals because the Union has filed charges with the National Labor Relations Board.

(e) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Reinstate in their entirety for a reasonable time all of the terms and conditions contained in its August 12, 1988 proposed collective-bargaining agreement, and, if the Union accepts that offer within said reasonable time, embody the agreement thus reached in writing, sign it, and execute it according to its terms, including by giving it retroactive and prospective effect for the term it contemplates.

(b) Post at its Portland, Oregon plant copies of the attached notice marked ''Appendix.''[31] Copies of the notice, on forms provided by the Regional Director for Region 19, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[29] As to Respondent's suggestion that it has already remedied the direct-dealing violation committed on or about April 19 by posting a certain notice suggested in a settlement agreement never approved by the Regional Director, I find that Respondent's subsequent unfair labor practices would leave employees in doubt whether Respondent genuinely intended to fulfill the good-faith bargaining obligations to which it committed itself in that notice. Moreover, I conclude that that particular notice did not, ''in readily understandable language, inform employees of their rights, how those rights were violated, or how those rights are being remedied.'' *Terrell Machine Co.*, 173 NLRB 1480, 1482 fn. 12 (1969). Accordingly, and inasmuch as it visits no penalty on Respondent merely to require it to recapitulate in a more comprehensive context what it has already promised in that earlier notice, the notice I have proposed includes reference to Respondent's obligation not to engage in direct dealing.

[30] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[31] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board (the Board) has found that we violated the National Labor Relations Act (the Act) when, on or about April 19, 1988, Len Kutch polled employees about their wishes regarding a union-shop clause in the union contract, and again when, on or about August 31, 1988, we withdrew a union-shop clause from our offer to your Union (Boilermakers Local 72) and substituted an open-shop proposal, and again on September 28, 1988, when Len Kutch told employees in a letter, in effect, that we had withdrawn our previous union-shop proposal because your Union had filed unfair labor practice charges against us with the Board. The Board has ordered us to stop violating employee rights, and to post this notice and live up to what it says.

Section 7 of the Act gives employees these rights.

> To organize
>
> To form, join, or assist any union
>
> To bargain collectively through representatives of their own choice
>
> To act together for other mutual aid or protection
>
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT conduct polls of our employees or otherwise question them to find out whether they support the Union's position at the bargaining table, or to determine their degree of support generally.

WE WILL NOT withdraw bargaining proposals in order to frustrate bargaining or to prevent the reaching of an agreement with the Union, or in retaliation for the Union's having filed charges against us with the Board.

WE WILL NOT tell employees that we have withdrawn bargaining proposals because the Union has filed charges against us with the Board.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of their rights guaranteed by the Act.

WE WILL immediately reinstate the offer we presented to the Union on August 12, 1988, and hold it open for a reasonable time; and, if the Union accepts it within a reasonable time, we will sign a contract with the Union containing all the terms of that offer, and we will honor that contract for the period contemplated in that offer.

NORTHWEST PIPE AND CASING COMPANY